No. 70-36

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IN THE

Supreme Court of the United States

CHARLES R. PERRY, et al.,
Petitioners,

vs.

ROBERT P. SINDERMANN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. If a teacher in a public college has neither tenure nor a contractual right to reemployment, may the college refuse to renew his employment because he has exercised his First Amendment rights?

2. Whether the court below correctly ruled that summary judgment was improper because there was a factual dispute as to the College's motivation in not renewing the teacher's employment?

3. Where a public college is considering non-renewal of a teacher for reasons which implicate First Amendment rights, is it obliged to provide the teacher with notice and a hearing prior to the decision not to renew?

4. Where a public college is considering non-renewal of a teacher, is it obliged, irrespective of the reasons therefor, to provide the teacher with notice and a hearing prior to the decision not to renew?

5. If a public college denies renewal to a teacher without providing him the procedural due process to which he is constitutionally entitled, is the teacher entitled to reinstatement and back pay without regard to whether valid substantive grounds existed for non-renewal?

While no jurisdictional issue has ever been raised below, this Court has a closely related jurisdictional question before it in *Lynch* v. *Household Finance Corporation,* No. 70-6356, probable jurisdiction noted, 39 L.W. 3375 (March 1, 1971). Because of this, we shall briefly discuss (*infra.* pp. 50-52) the question whether federal courts have jurisdiction over an action in which a public college teacher alleges that his constitutional rights have been violated in that, without a pre-termination hearing, he has been denied re-employment because of the exercise of First Amendment rights.

COUNTER-STATEMENT OF THE CASE

Respondent, Robert P. Sindermann (hereinafter "Sindermann") is a college teacher of Government and Social Science. In May, 1969, he was completing his tenth year of teaching in public colleges in the State of Texas — two at the University of Texas, four at San Antonio Junior College, and four at respondent Odessa Junior College (hereinafter "the College"). On May 19, 1969, Sindermann was advised that his employment would not be renewed for the following school year (A. 53). No claim

was made that Sindermann was not a good teacher — indeed his colleagues in the College's Social Science Department have attested to his competence (A. 52). Rather, Sindermann's non-renewal resulted exclusively from his activities outside the classroom.

During the academic year 1968-69, Sindermann was active in two causes. One was an effort to obtain tenure protection for teachers in public colleges in Texas. The other was an effort to obtain elevation of the College from the status of a two-year junior college to a four-year college. On both issues, Sindermann's position was contrary to that of the Board of Regents of the College (A. 13-15).

In February, 1969, Sindermann was elected President of the Texas Junior College Teachers Association (hereinafter "the TJCTA"), an organization of teachers employed by Texas' 42 public junior colleges. Teacher tenure was one of TJCTA's major goals (A. 12, 86).

At about the same time, Sindermann became a member of "The Committee to Elevate Odessa College," a citizens' organization advocating elevation of the College to four year status (A. 14).

The Texas Legislature, which meets biennially, was in session from January 14 through June 2, 1969. During this session, legislation was introduced on both issues in which Sindermann was interested. In the Texas Senate, these bills were S.B. 512 (according tenure to teachers in public colleges) and S.B. 531 (establishing a four-year college in the Permian Basin). Throughout this period, Sinderman campaigned actively, on his own time, in support of both bills (A. 13-15, 20).

In early April, 1969, Sindermann received a letter from Delton Goodin, Legislative Committee Chairman of the TJCTA, advising that a hearing would be held in Austin on the tenure bill (S.B. 512) on April 23. Goodin's letter stated:

> "It is imperative that you as T.J.C.T.A. President and member of the Legislative Committee attend this hearing. The president of T.A.C.T. and A.A.U.P. will represent their organizations at the Tenure Bill hearing, so T.J.C.T.A. should exhibit equal interest."[1]

Sindermann also received letters from two members of the Senate Committee which was to conduct the hearing, inviting him to testify (A. 50, 51). Austin is several hundred miles from Odessa, and the only way Sindermann could testify was to be absent from the College on the day of the hearing. Accordingly, Sindermann addressed a letter to the Chairman of his Department enclosing a copy of Goodin's letter and requesting permission to be absent on April 23 (A. 16).

Sindermann's request was referred to the Dean of the College, and then to the President of the College, who denied it. The President gave four reasons for denying the request:

> 1. Sindermann was employed as a full-time teacher, and "can make his contribution to Odessa College only by being present to teach";
>
> 2. The TJCTA has a full-time Legislative Committee Chairman — Goodin — "and it is this person who should have represented the organization if it was to be represented. The President of an organization can not perform all the duties of his officers, and he should not attempt to do so";
>
> 3. The TJCTA had not formally endorsed S.B. 512;[2] and

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[1] Although this letter was attached as an exhibit to a document which was a part of the record below (A. 15-16), it was not printed by Petitioners in the Appendix. Accordingly, we have reprinted it in the Appendix to this brief (*infra*, p 1a).

[2] In an affidavit below, Sindermann stated that the bill *was* sponsored by TJCTA (A. 86).

4. The College had demonstrated "an interest . . . in faculty 'rights'," and indeed was planning to consider adopting a "statement on tenure" in the upcoming academic year (A. 16-17).

Despite the refusal of his request, Sindermann notified the Dean of the College that he would be absent on April 23 to testify on the tenure bill. He arranged for other members of the College's Social Science Department to teach his classes on that day, and they did so (A. 19). Sindermann was guided by the Faculty Guide, promulgated by the College Administration, which he understood to mean that permission was required to qualify for payment for an absence, but that absence without permission was tolerated, albeit not compensable (A. 87).[3]

When Sindermann arrived in Austin on April 23 he learned that the hearings on S.B. 512 had been postponed to April 28. On that date, hearings were also to be held on S.B. 531 (the bill to establish a four year College). Sindermann had been invited by State Senators to testify on the latter bill as well. Accordingly, on April 25, following his return to the College, Sindermann addressed another letter to his Department Chairman, requesting permission

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[3] Faculty Absences:

"Arrangements for absence *with full pay* shall be made in advance by the employee. Approval for absence because of personal or family illness shall be granted by the departmental chairman and the Dean of the College. Approval of absence for other causes shall be obtained from the Dean of the College and subject to final approval by the President. *The employee shall have 1/180 of his annual salary deducted for each day of such absence not approved by the departmental chairman, the Dean of the College or the President.*" (Emphasis added.) (Faculty Guide at pp. 52-53.)

The Faculty Guide was an appendix to the complaint, but was not printed by Petitioners in the Appendix to this Court.

to be absent on April 28.[4] He stated that other members of the Department were available and willing to teach his classes on that day, and that he was prepared to pay them himself for substituting for him. Noting that one of the grounds for the President's prior refusal was that testimony should be delivered by the Legislative Committee Chairman of the TJCTA (Goodin), he pointed out that Goodin "will be unavailable to testify on Monday, April 28, owing to the necessity to take his three children . . . for tonsillectomies. If I do not testify no one from our organization will, and it is *our* bill."

This letter was referred to the Dean of the College and the President of the College, who refused Sindermann's request. Sindermann notified his Department Chairman that he would nonetheless be absent to testify on April 28, and he was (A. 19-20).[5]

On May 6, Sindermann distributed a mimeographed letter reporting that S.B. 512 (the tenure bill) had been "put in deep freeze" by the Senate Committee, and urging the members of the College faculty to write and wire legislators to help "jar it out of Committee" (A. 20).

On that same day, May 6, the Board of Regents, meeting in Executive Session, was informed of the entire course of Sindermann's above-described activities during the academic year and "expressed disapproval of Mr. Sindermann's actions" (A. 20). At that same meeting, the Board

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[4] This letter, too, was an attachment to a document in evidence below (A. 19), but was not printed by Petitioners in the Appendix. Accordingly, we have reprinted it in the Appendix to this brief (*infra*, pp. 2-7a.)

[5] The opinion of the court below recites that on "at least four occasions" Sindermann was absent to testify (A. 188). The record reflects only two absences, on April 23 and April 28, and a request for permission to be absent on a third day — May 19 — which fell after the decision not to renew his employment. The record does not reflect whether Sindermann in fact was absent on May 19 (A. 21-22).

determined not to renew Sindermann's employment for the coming school year.[6]

On May 19, Sindermann received a letter from the President of the College (A. 53), stating:

> "The Board of Regents on May 6, 1969, voted to approve my recommendation not to renew your contract for 1969-70. You have been supplied with a statement, with attachments, indicating the basis for this recommendation."

The "statement, with attachments" was a press release which had been issued by the President a few days earlier (A. 12-23). The press release began by reporting that after Sindermann had been hired by the College he had been named Co-Chairman of the Social Sciences Department (A. 12), but that he had been removed as Co-Chairman in the fall of 1968 because, *inter alia*, he had an "addiction" to writing "lengthy letters" to the members of his department (A. 12). It then described Sindermann's election as President of the TJCTA (A. 13), and his aligning himself with the Committee to Elevate Odessa College "in contradiction to a policy statement of the Board of Regents in the matter" (A. 14). As to the latter, the press release declared:

> "Unfortunately, Odessa College has been the object of 'politics' in recent months through the efforts of various people to secure the elevation of Odessa College to four year status." (A. 13).

Sindermann's efforts, on his own time, to advance the tenure and college elevation causes, were recounted in the press release in some detail (A. 14, 15, 20). In addition, the press release also charged that (A. 15):

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[6] While a press release (A. 12-23) issued a few days later indicates otherwise, the nonrenewal letter (printed in the text below) he received on May 19 made it clear that the Board made the nonrenewal decision on May 6.

> "In the heat of the dissension on the elevation of Odessa College . . . a rather disgusting ad was run, to which Mr. Sindermann's name was attached, in the local newspaper. This ad ridiculed the position taken by the Board of Regents of Odessa College . . .
>
> "While Mr. Sindermann submitted a letter of 'disclaimer' to the President of the Board of Regents, his 'guilt by association' cannot be refuted, because he had acted with this group, opposed to a stated position of the Board of Regents."[7]

The release then described Sindermann's requests to absent himself, the refusals of those requests, and his two absences (A. 16-20). After referring to Sindermann's May 6 letter urging the faculty to wire or write their legislators to "jar" S.B. 512 "out of Committee," the press release recited that on May 6 the Board of Regents "was given the information above" and "expressed disapproval of Mr. Sindermann's actions" (A. 20).

At no time had Sindermann been offered or accorded a hearing on his non-renewal (A. 87). On May 21, 1969, two days after receiving the notice of non-renewal, he wrote to the College President requesting a formal statement of the reasons and a hearing.[8] No response to this request was ever forthcoming.

On May 23, Sinderman filed the complaint in the instant action, naming the Board of Regents, its members, and the

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[7] The ad, although an exhibit to the press release (A. 15), was not printed by Petitioners in the Appendix. Accordingly, we have reproduced the ad in the Appendix to this brief (*infra*, pp. 16-17a). As is apparent from reading the ad, it was neither "disgusting" nor aimed at the Board of Regents.

[8] Although not a part of the record in the district court, this letter is discussed in the Court of Appeals' decision (A. 195), and we have printed it in the Appendix to this brief (*infra*, p. 8a.)

College President as defendants. Jurisdiction was predicated upon 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (A. 2). The complaint alleged that Sindermann was denied renewal because he had publicly advocated positions contrary to the views of the College administration, thereby contravening his rights under the First and Fourteenth Amendments (A. 7-8, 9). It further alleged that Sinderman, afforded neither notice nor a hearing prior to the Board's decision not to renew him, had been denied procedural due process, in violation of the Fourteenth Amendment (A. 10-11). The complaint alleged that defendants' actions not only deprived Sindermann of employment by the College, but also damaged his reputation and his ability to obtain employment in other colleges in the State of Texas, and would chill the exercise of First Amendment rights by other teachers at the College (A. 8).

The defendants moved for summary judgment (A. 78-85). They filed no affidavits or exhibits in support of their motion, relying exclusively upon the materials which had been attached to the complaint (including, *inter alia*, the press release explaining the reasons for dismissal). The motion advanced two reasons why defendants were entitled to prevail:

> 1. As Sindermann admitted he had neither tenure nor a contractural right to employment for the following year, his non-renewal could not give rise to a justiciable claim; and
>
> 2. In any event, Sindermann admitted that he had absented himself without permission, these absences furnished just cause for the non-renewal, and — there being no factual dispute about the occurrence of the absences — there was no reason for the College to furnish Sindermann a hearing.

The district court granted the motion for summary judgment. Its reasons, in their entirety, were as follows (A. 106-107):

I

Plaintiff's tenure of employment ended May 31, 1969.

II

Odessa Junior College has no tenure system which fact was known to the Plaintiff at the time he entered into his original contract with the College.

III

After the termination of his contract of employment the Defendant College owed no obligation to the Plaintiff.

I conclude:

I

Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system.

II

Plaintiff has no contract with the Defendant College.

III

Plaintiff has no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff.

IV

Defendants have not violated any constitutional rights of the Plaintiff.

Sindermann appealed, and the Fifth Circuit reversed and remanded for "further development of the facts" (A. 186). It rejected the district court's basic holding — that

because Sindermann had no tenure or contractual claim to reemployment he could have no cause of action for its denial — as inconsistent with the line of decisions establishing that a state may not condition the enjoyment of a privilege upon abstention from the exercise of First Amendment rights (A. 190-191). Looking to the record thus far made in the district court, it concluded that there was a factual dispute, precluding summary judgment, over "whether the college refused to renew the teaching contract on an impermissible basis — as a reprisal for the exercise of constitutionally protected rights" (A. 191, 192). Summary judgment in favor of defendants was "totally inappropriate in the case at bar, where the only affidavits on which summary judgment were based were submitted by the plaintiff and when there was a clear offer to prove facts constituting a constitutional claim." (A. 191-192).

Furthermore, the Court regarded the case as requiring remand even if it were to be assumed that the sole reason motivating the non-renewal were Sindermann's unauthorized absences (A. 191):

> "We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his . . . exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of their orders."

The court below then discussed the procedural due process allegations of the complaint. "Since the case must be remanded, it is appropriate that we comment on plaintiff's contention that the college denied him procedural due process by simply announcing that he would not be rehired and failing or refusing to give him a hearing" (A. 192). The court reiterated its prior holdings that (1) a

teacher with an "expectancy of reemployment" must be afforded notice and hearing prior to the decision not to renew, *Ferguson* v. *Thomas*, 430 F.2d 852 (1970) (A. 192); and (2) a teacher lacking such an expectancy nonetheless is entitled to an administrative hearing upon demand, following notice of non-renewal, if he "assert[s] that such non-renewal is really a form of punishment for his exercise of Constitutional rights" (A. 194). The court found the record thus far developed "too scanty" to determine whether Sindermann had an expectancy of reemployment (A. 193); what evidence was in the record "creates at least some doubt in this court's mind" that, as the College claimed, Sindermann lacked such an expectancy (A. 193, n. 8). While there was no dispute that Sindermann asserted that the non-renewal was punishment for the exercise of his Constitutional rights, and that he had demanded an administrative hearing, there was a dispute as to whether he had "jumped the gun" by filing his lawsuit without awaiting a response to his hearing request (A. 195). The court left the resolution of these factual questions, and thus of the ultimate procedural due process claims, to further development following remand to the district court.

SUMMARY OF ARGUMENT

1. The district court granted summary judgment to defendants because Sindermann had neither tenure nor a contractural right to reemployment and, therefore, "no right which would require defendants to execute a contract with plaintiff, or to employ plaintiff." This decision is plainly inconsistent with a long line of decisions of this Court holding that public employment, though it may be denied altogether, may not be conditioned upon forebearance from the exercise of First Amendment rights. While this principle has been applied most often to dismissals in mid-term, this court has also applied it to non-renewal of teachers for the following term. *Shelton* v. *Tucker*, 364 U.S. 479, 483,

484 (1960); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 592, (1967). In order to win, Sindermann will have to establish that his activities fell on the permissible side of the balance-line drawn in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), but, if he can, his lack of tenure or a contractural right to reemployment is no defense.

2. The court below correctly held that, on the record thus far developed, factual disputes precluded summary judgment in favor of defendants on the question whether non-renewal violated Sindermann's First Amendment rights. Except for his two unauthorized absences (which fall into a grey area requiring balancing) all of Sindermann's efforts in the tenure and college elevation causes were clearly protected under the *Pickering* standards. Sindermann makes three claims here, as to each of which there is a factual dispute. (a) Even if the absences were not constitutionally protected, it is Sindermann's claim that he was denied reemployment because of the clearly protected activities, the absences merely being seized upon by the College as a pretext to effect his removal. The existence of legitimate grounds for dismissal is no defense if the *real* reason motivating it was the exercise of First Amendment rights. (b) Even if the absences were *one* of the reasons for Sindermann's non-renewal, there is no evidence to support a holding that they were the *only* reason, as defendants concede (brief, page 8). If non-renewal was motivated even in part by the exercise of First Amendment rights, it was improper. (c) Finally, even if the non-renewal were motivated *solely* by the absences, it would have to be decided whether the absences were protected activity under *Pickering*. While teachers do not have a right to absent themselves at will to engage in First Amendment activities, they may have a right to be absent where the occasion is important, expression impossible at other times, and the impact upon the school slight or non-existent. *Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir. 1947), cert. denied 332 U.S. 825 (1947). On the

present record, any balancing of interests surely favors Sindermann. He had strong motivation to testify, he could do so only on the days when the hearings were held, he took special precautions to assure that his classes would be taught, and the College has not claimed any interference with its interests. Of course the College may have countervailing evidence not yet advanced which should be weighed in the balance, and it would be inappropriate to decide this important constitutional question on an abbreviated record. But surely defendants were not entitled to summary judgment.

3. Sindermann was entitled to notice and a hearing prior to the College's decision not to renew him. There are two quite distinct reasons why this is so.

(a) This court has held that, where a State undertakes to regulate or punish expression on the ground that it falls outside the First Amendment's protection, such action must be preceded by notice and hearing. *Speiser* v. *Randall*, 357 U.S. 513 (1958). Freedom of expression must be "ringed about with adequate bulwarks" so that protected speech will not be deterred by the fear that it might be punished as unprotected. As *Pickering* makes clear, the teacher's criticism of his superiors is an area where delicate line-drawing is required between protected and unprotected speech. Where, as here, non-renewal implicates the First Amendment, it must be preceded by notice and hearing. The court below agreed that a hearing was required for this reason, but it was of the view that such a hearing could *follow* non-renewal, with the burden of proof on the teacher to prove that his speech was protected. In both these respects, the decision below departs from decisions of this Court. Absent unusual circumstances (not present here), due process requires a hearing *before* injury is inflicted. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). And in such hearing the State must bear the burden of proving the speech unprotected. *Speiser* v. *Randall*, *supra*.

(b) The other reason why Sindermann was entitled to notice and hearing is applicable to all teachers, irrespective of the reason for their non-renewal: non-renewal visits severe injury upon a variety of protected interests, of such magnitude as to outweigh the "governmental interest in summary adjudication." *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971). Teachers have a vital interest in retention of their jobs; job loss entails severe financial hardship, the disruption of established associations with colleagues and students, and the impossibility of pursuing one's teaching career without picking up roots and moving to another city with all that this entails. This Court has repeatedly emphasized that teachers' employment may not be withheld arbitrarily, but that doctrine is meaningless if the State need not disclose the reasons for non-renewal or afford an opportunity for the teacher to expose error. As a practical matter, non-renewal severely injures a teacher's reputation and, as the Rhode Island Commissioner of Education recently noted, "can mean the end of his professional career," for non-renewal renders teachers virtually unemployable. Finally, if teachers are not assured notice and hearing before non-renewal, academic freedom is out the window; few teachers will be bold enough to voice unpopular opinions knowing that they can be summarily denied non-renewal, and without even the assurance of being blessed — as Sindermann was — with a candid acknowledgement that expression was the reason. Each of these interests, and surely all of them combined, are "important" enough to entitle teachers to notice and hearing.

These interests are not outweighed by the "Governmental interest in summary adjudication." A hearing requirement would not impose an unmanageable administrative burden, as is demonstrated by the fact that most States accord hearings to tenured teachers prior to non-renewal, and

eleven States provide hearing to all teachers. Nor would a hearing requirement deprive States of flexibility in selecting the optimal teaching staff, for according procedures does not limit in any way the grounds upon which non-renewal may be predicated. Finally, a hearing requirement would not destroy the distinction between tenured and non-tenured teachers — a distinction which is not of constitutional dimensions in any event — because the essential advantage of tenure to the teacher is that it limits the *substantive* grounds upon which reemployment can be denied, and that advantage will remain even if *all* teachers are entitled to receive hearings.

4. If Sindermann's non-renewal was procedurally defective, because not preceded by notice and hearing, he is entitled to reinstatement with back pay, irrespective of whether the non-renewal was substantively justified. A procedurally defective decision is "illegal and of no effect," *Vitarelli* v. *Seaton*, 359 U.S. 535, 545 (1959); it must be "set aside," and the "slate . . . wiped clean." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Where employment termination is procedurally defective, the required remedy is automatic reinstatement with back pay. *Vitarelli, supra; Greene* v. *U.S.*, 376 U.S. 149 (1964); *Greene* v. *Howard University*, 412 F.2d 1128 (D.C. Cir. 1969). Simply according the denied procedures at this late day is insufficient, for "a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what the outcome would have been had the procedural safeguards been afforded in the first instance." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365, n. 18 (1963).

5. Although petitioners have not challenged federal court jurisdiction over this action, this Court has a similar question before it in another case, *Lynch* v. *Household Finance Corp.*, No. 70-6356, probable jurisdiction noted, 39 L.W. 3375 (March 1, 1971), and thus we discuss it. 28 U.S.C.

§ 1343(3) extends federal jurisdiction to every alleged violation of 42 U.S.C. § 1983, as is clear from the identity of language in the two provisions and the fact that they were adopted simultaneously in the Civil Rights Act of 1871. The Second Circuit's line of decisions limiting the scope of 28 U.S.C. § 1343(3) to alleged deprivations of "liberty" (as distinguished from "property") is inconsistent with *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437-438 (1971). In any event, even under the Second Circuit's "liberty-property" dichotomy federal jurisdiction extends to the instant case, for the interests claimed to have been violated — freedom of expression and freedom to pursue one's profession — are rights of "liberty."

ARGUMENT

I. A PUBLIC COLLEGE MAY NOT DENY RENEWED EMPLOYMENT TO A TEACHER BECAUSE HE HAS EXERCISED HIS FIRST AMENDMENT RIGHTS

The district court granted summary judgment in favor of defendants because Sindermann had neither tenure nor a contractual right to reemployment and, therefore, "no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff" (A. 107). The court below rightly reversed this ruling as contrary to well-established principles.

Although Sindermann may not have had a "right" to reemployment, the College nonetheless could not condition reemployment upon his forebearance from exercising federal Constitutional rights. "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of Constitutional guarantees." *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968).

We may assume, for present purposes,[9] that a teacher's

[9] But see pp. 36, *infra*.

continued employment is but a "privilege," and not a "right." Even so, the State may not condition enjoyment of that "privilege" upon the surrender of First Amendment rights. But Sindermann claims that it has withheld a privilege which he might otherwise enjoy—the privilege of teaching in the College—because of their exercise and, by thus treating him, has served notice on others similarly situated that they may expect the same consequences should they be equally bold. Such conditions offend the Constitution, as this Court made clear as early as *Frost* v. *Railroad Commission*, 271 U.S. 583, 593-594 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of those limitations is that it may not impose conditions which require the relinquishment of Constitutional rights. If the state may compel the surrender of one Constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."

This Court repeatedly has applied this principle to teachers in public educational institutions. Although such teachers have had neither tenure nor contractual claims to their jobs, "This Court has . . . rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of . . . the opportunity for public employment." *Speiser* v. *Randall*, 357 U.S. 513, 518-519 (1958). See, e.g., *Pickering* v. *Board of Education*, 391 U.S. 563, 566 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). See also Van

Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L. J. 841, 843-858 (1970).

While this principle has most often been applied to dismissals of teachers in mid-term of the school year, this Court has made clear that it is equally applicable to the non-renewal of teachers for the following term. One of the petitioners in *Keyishian*—Keyishian himself—was a teacher whose "one-year-term contract was not renewed" (385 U.S. at 592). So too, the petitioners in *Shelton* were a teacher whose "contract for the ensuing school year was not renewed" (364 U.S. at 483), and two teachers who "were advised that their failure to comply . . . would make impossible their re-employment as teachers for the following year" (*Id.*, at 484). In each case, this Court held that conditioning renewal upon surrender of First Amendment rights was beyond the State's power.

These holdings were inevitable; for the courts to have found a meaningful distinction between dismissal and non-renewal cases would have invited subterfuge. Thus, through the simple expedient of delaying "dismissal" actions a short time to correspond with the termination of the school year, the State could vitiate a teacher's exercise of constitutional rights. Such a result, of course, is untenable.

To be sure, this Court has recognized that a balance must be struck "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra,* 391 U.S. at 568. But, precisely because of the district court's erroneous analysis of the law, that balance is yet to be struck in this case. And when it is, if it is determined that Sindermann did not transcend the bounds of speech permitted to a public teacher, the State cannot justify his non-renewal on the ground that he lacked tenure or a contractual right to re-employment.

The decision of the Tenth Circuit to the contrary in *Jones* v. *Hopper*, 410 F.2d 1323 (1969), cert. denied 397 U.S. 991, is an aberration. It is squarely in conflict with the overwhelming weight of judicial authority. See, for example, *Shelton, supra; Keyishian, supra; Pred* v. *Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969); *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir. 1970); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); and *Roth* v. *Board of Regents*, No. 18490 (7th Cir., July 1, 1971). For the reasons explained above, we submit that *Jones* is plainly wrong. Indeed, the Tenth Circuit itself is presently reexamining *Jones* in the context of its *en banc* consideration of *O'Neil* v. *Board of Education*, No. 693-70.

II. THE COURT BELOW CORRECTLY HELD THAT FACTUAL DISPUTES PRECLUDED GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

We have shown that Sindermann's lack of tenure or a contractual right to reemployment was no defense if he could establish that non-renewal was visited for the exercise of First Amendment rights not inconsistent with his role as a teacher. We now show that, as the court below held, there existed a factual dispute precluding summary judgment on whether such exercise was, indeed, the reason for his non-renewal.

At the outset it must be noted that most of Sindermann's "First Amendment" activities fell clearly on the permissible side of the balance commanded in *Pickering*. His speeches, testimony, and associational activities in support of a State tenure law, and his activities in support of the elevation of Odessa College to four year status, have not even been alleged (let alone proved) to have been false or defamatory;

they were "in no way directed toward any person whom [Sindermann] would normally be in contact in the course of his daily work as a teacher" (*Pickering*, 391 U.S. at 569-570); they threatened neither discipline nor harmony among co-workers (*ibid*); and they were clearly issues as to which teachers at Odessa College were in a unique position to provide information which the public (and the Texas legislature) would want to have in determining the direction of State policy. Only one of Sindermann's many activities—absenting himself on two occasions to testify before Texas legislative committees—can be said to fall into the "grey zone" calling for more delicate balancing under the *Pickering* test.

With this preliminary observation, we turn to the nature of Sindermann's claims. As we will show, there are at least three distinct reasons why, on the record thus far formulated in the district court, summary judgment could not be granted in favor of defendants.

First, even assuming that Sindermann's absences were not Constitutionally protected, it is his claim that they were not the real reason for his non-renewal. Rather, he contends, it was his advocacy of a tenure law[10] and the elevation of the College which motivated the defendants not to renew him, and the absences were merely seized upon as a pretext to effect his removal from the College.

If Sindermann could prove this claim, it is clear that he would be entitled to relief. A state may not mask a Constitutionally impermissible non-renewal by asserting pre-

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[10] Texas has no tenure law covering public college teachers. The only "tenure" afforded faculty members at the College is described in the Faculty Guide thusly: "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work" (A. 15).

textural reasons for its action. Cf. *Johnson* v. *Branch, supra,* 364 F.2d at 182:

> "The only reasonable inference which may be drawn from the failure to renew Mrs. Johnson's contract in the face of her splendid record of twelve years *on such trivial charges* was the Board members' objections to her [civil rights] activity." (Emphasis added).

Accord: *Fluker* v. *Alabama State Board of Education,* No. 30670 (5th Cir., March 31, 1971) (slip opin., p. 18). See also *Chase* v. *Fall Mountain Regional School Dist.,* Civ. Ac. 3112 (D.N. H., July 28, 1971): "When a violation of Constitutional rights is alleged . . . the reasons given for dismissal must be closely examined to make certain that they are not simply a facade to conceal the fact that dismissal was for activity protected by the Constitution." (slip opin., p. 17).[11]

On the present record, there was ample evidence to preclude summary judgment against Sindermann on this issue. He had taught in Texas colleges for ten years, and at this College for four, and there is no evidence that he was

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[11] Closely analogous are decisions under the National Labor Relations Act, 29 U.S.C. § 151 et seq. That Act forbids discharges motivated by employees' union activities (Section 8 (a) (3), 29 U.S.C. § 158(a) (3)), but otherwise permits an employer to discharge employees for "cause" (Section 10(c), 29 U.S.C. § 160(c)). Taken together, these provisions preclude interference with the employer who discharges employees "because of misconduct." *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 217 (1964). But "a justifiable basis for discharge is no defense . . . if such ground is used as a pretext and is not the motivating cause of discharge." *Singer Company* v. *NLRB,* 371 F.2d 623, 624 (8th Cir. 1967). The "question . . . was not whether there existed a valid ground for discharge, but whether the stated ground was the real one." *J. P. Stevens & Co.* v. *NLRB,* 380 F.2d 292, 300 (2nd Cir. 1967), cert. denied 389 U.S. 1005 (1967). An employee's "unexcused leaving of his job" may not be "seized upon" as a pretext for discharge where the employer's real motive is "to rid itself of a union man." *NLRB* v. *Murray Ohio Manufacturing Co.,* 326 F.2d 509, 517 (6th Cir. 1964).

other than a fully competent teacher throughout his career. His colleagues in the Social Science Department have so declared (A. 52), and the fact that he was named co-chairman of the Department for a time (A. 12) signifies that the College administration must have agreed. The press release issued by the College President, explaining Sindermann's non-renewal, manifested great hostility to the full gamut of Sindermann's First Amendment activities. Sindermann had an "addiction" to writing "lengthy letters" to his colleagues (A. 12); the efforts of "various people" to elevate the College to four year status was "unfortunate" (A. 13); Sindermann "saw fit to align himself with this group in contradiction to a policy statement of the Board of Regents in the matter" (A. 14); this group's efforts led to "dissension" (A. 15); the ad published by this group was "disgusting", and although Sindermann disclaimed responsibility for the ad "his 'guilt by association' cannot be refuted, because he had acted with this group, opposed to a stated position of the Board of Regents" (A. 15);[12] the Board of Regents, "given the information above . . . expressed disapproval of Mr. Sindermann's actions." (A. 20).

Moreover, the College's actions in refusing Sindermann's requests to be absent to testify cast doubt that the absences were the real reason for his non-renewal. The first request, seeking a one day absence, was forwarded to the College President, who prepared a four-point response denying it, three of these points having nothing to do with the need for Sindermann's services on that day (A. 16-17); Sindermann claims that those who substituted for him during the first absence were "intimidated" for doing so (*infra*, p. 4a); the Faculty Guide, on its face, suggests that permission is needed only for *paid* absences, and that the lone consequence for unexcused absence is loss of one day's pay

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[12] Cf. *Keyishian v. Board of Regents, supra,* 385 U.S. at 607 (there is "no place" for "the doctrine of 'guilt by association' ").

(*supra*, p. 5); the College offered no evidence that non-renewal is a customary consequence of two days' unauthorized absence, and disparate treatment is a key factor supporting a finding of pretextual motivation, *NLRB* v. *Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (2d Cir. 1965); and two days' absence surely is an unlikely basis for denying renewal to one who has taught in the College for four years.

In sum, on the record thus far made, the court below correctly concluded that "the truth . . . was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary judgment was improper." (A. 192).[13]

Second, even if Sindermann's absences were *one* of the reasons for his non-renewal, there is no evidence to support a holding that they were the *only* reason. Even the press release, a wholly self-serving document, did not assert that the absences, as distinguished from Sindermann's other First Amendment activities, were the sole basis for non-renewal. Indeed, the most that defendants can muster in their brief to this Court (page 8) is that Sindermann's absences were "one of the reasons for failing to renew his contract."

Teachers are entitled to reinstatement if they can establish "that the University's action was even *partially* in retaliation for their anti-administration activities." *Fluker*

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[13] This holding comports with the general recognition, in NLRB cases, that issues of motivation turn peculiarly upon the facts, and upon the trier of facts' observations of the demeanor of the witnesses. Such cases require "a delicate factual determination." *NLRB* v. *Park Edge Sheridan Meats, Inc., supra*, 341 F.2d at 728. "Ascertaining an employer's motives frequently presents perplexing problems for the fact finder." *Betts Baking Co.* v. *NLRB*, 380 F.2d 199, 204 (10th Cir. 1967). "[W]here . . . contradictory reasons for the discharge of an employee are advanced, it is the responsibility of the [trier of fact] to weigh the evidence and resolve the factual conflict." *NLRB* v. *Buitoni Foods Corp.*, 298 F.2d 169, 174 (3rd Cir. 1962).

v. *Alabama State Board of Education, supra* (slip opin., p. 22) (emphasis added). See also *Roth* v. *Board of Regents,* 310 F.Supp. 972, 982 (W.D. Wisc. 1970), affirmed No. 18490 (7th Cir., July 1, 1971); *Montgomery* v. *White,* 320 F. Supp. 303, 305 (E.D. Tex. 1969).

Here again, the NLRB decisions teach that a discharge even partially motivated by impermissible reasons is unlawful. "[I]f a desire to stifle protected activity is *a factor* in the employer's decision, the discharge is discriminatory." *NLRB* v. *Hanes Hosiery Division,* 413 F.2d 457, 458 (4th Cir. 1969; emphasis added). Although a discharge was motivated partially by an employee's unexcused absences, "it is enough" to establish illegality "that a discriminatory motive was a factor in the employer's decision." *Winchester Spinning Corp.* v. *NLRB,* 402 F.2d 299, 304 (4th Cir. 1968). "If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation . . ." *NLRB* v. *Jamestown Sterling Corp.,* 211 F.2d 725, 726 (2d Cir. 1954).[14]

The press release declares that the College had shown "tolerance" toward Sindermann's earlier activities (A. 17-18) and might be read as indicating that the unauthorized absences were the "final straw." Even if that is what the author meant, "there is clearly no obligation . . . to accept at face value the reason advanced by the employer." *NLRB* v. *Buitoni Foods Corp., supra,* 298 F.2d at 174. But even if it were true it would not justify the non-renewal, for even then constitutionally protected activities were *among* the straws which motivated the non-renewal. Cf. *Fluker* v. *Alabama State Board of Educ., supra* (slip opin.,

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[14] See also *J. P. Stevens & Co.* v. *NLRB, supra,* 390 F.2d at 300; *NLRB* v. *L. E. Farrell,* 360 F.2d 205, 208 (2d Cir. 1966); *NLRB* v. *West Side Carpet Cleaning Co.,* 329 F.2d 758, 761 (6th Cir. 1964); *NLRB* v. *Great Eastern Color Lithographic Corp.,* 309 F.2d 352, 355 (2d Cir. 1962), cert. denied 373 U.S. 950 (1963).

p. 18); *NLRB* v. *Great Eastern Color Lithographic Corp.*, *supra*, 309 F.2d at 355.

Third, even if it were established that the unauthorized absences were the *real* and *only* reason for the non-renewal, summary judgment would be improper. For there would remain for determination whether the College was entitled to forbid Sindermann's requests.

This issue, as we have acknowledged, falls into the grey area in which *Pickering* calls for balancing. Clearly, teachers are not entitled to absent themselves whenever they choose to exercise their First Amendment rights. But does it follow that they may never do so, no matter how important the occasion, how impossible their exercise at other times, and how little inconvenience is caused the school?

In the only case we have found which discusses this issue, *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir. 1947), cert. denied 332 U.S. 825 (1947), it was concluded that a balancing of interests was required. There, a teacher absented herself for a month to serve on a federal jury, although entitled to an exemption from jury duty had she sought one. Discharged for her absence, she sued under 42 U.S.C. § 1983.[15] The district court dismissed her complaint, but the Court of Appeals reversed and remanded for trial. In its decision, by Judge Learned Hand, the court explained (*id* at 139):

> "We do not mean to suggest that a teacher may absent herself from her work indefinitely, and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases. Certainly there are 'reasonable' limits to the exercise of her privilege; but the question whether she kept within such limits we cannot decide now;

[15] Then 8 U.S.C.A. § 43.

it must be tried, for all we have is that her service as such was the ground for her discharge."

If a balancing of interests is called for, the present record surely favors Sindermann. He had strong reasons for wishing to testify on the two bills he was supporting, and could do so only by absenting himself on the two days when the Texas legislature scheduled its hearings. He arranged for other members of his Department to teach his classes, so that the curriculum would not be interrupted, and offered to pay them out of his own pocket. If the College believes that his absences caused harm to its curriculum, or harmed its interests in any other way, it has yet to say so.

Of course, the College may have evidence not yet advanced which should be weighed in the balance, and it would be wholly inappropriate to decide this important constitutional issue on an abbreviated record. This is all the more true because the issue probably need never be reached, it being doubtful the absences will emerge as the sole reason for the non-renewal. But surely the Fifth Circuit was correct in concluding that on this record summary judgment could not be granted in favor of *defendants*.

III. SINDERMANN WAS ENTITLED TO NOTICE AND HEARING PRIOR TO THE DECISION NOT TO RENEW HIM

The complaint in this action alleges not only that the non-renewal was substantively defective (because visited as retaliation for the exercise of First Amendment rights) but also that it was procedurally defective (because Sindermann was afforded neither notice nor a hearing on the proposed non-renewal). It is Sindermann's position that he was entitled to notice and a hearing prior to the decision not to renew him and that, such procedures not having been afforded, he is entitled to reinstatement with back pay irrespective of whether there existed valid grounds for his non-renewal.

We detail these contentions herein. Before doing so, we are obliged to take note of the curious posture in which the procedural due process issues come before this Court. The court below did not purport to resolve these issues finally, but merely found it "appropriate" to reiterate its conception of the controlling rules "since the case must be remanded" (A. 192). While the rules enunciated by the court below are not as broad as those which Sindermann believes warranted, it is conceivable (though hardly assured) that they are broad enough to afford Sindermann all the relief which he seeks. For these reasons—and particularly because of the interlocutory nature of the court below's discussion of these issues—Sindermann did not petition for certiorari. Defendants, of course, did petition, but their petition concentrated most of its fire on the substantive due process issues, and gave at most passing indication that defendants were displeased with the comments of the court below relating to procedural due process (Petition, pp. 14, 20). But in an *amicus* brief, the National Education Association strongly urged that certiorari be granted to resolve the conflict among the circuits on the procedural due process issues.[16] This Court granted certiorari without delineating the issues to be argued. In their brief on the merits to this Court (pages 12-13) defendants have argued—much more explicitly than in the petition—that the court below erred in its procedural due process comments. Accordingly, although not sure whether the issues are properly before the Court or whether the Court will choose to reach them, we present our arguments on procedural due process.

There are two wholly separate bases for the conclusion that Sindermann was entitled to notice and a hearing prior

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[16] Although urging that certiorari be granted because of the conflict, the NEA's brief made clear that it supported Sindermann's position (Brief for NEA, p. 4).

to non-renewal. The first arises out of the fact that the grounds for non-renewal (regardless which of those in the press release truly motivated the decision) necessarily had First Amendment implications, and this Court has made clear that any attempt to punish expression on the ground that it falls outside the First Amendment's protections must be preceded by notice and a hearing.[17] The second, wholly independent reason is one which is applicable to all teachers in public educational institutions: they have important interests which are adversely affected by non-renewal, and thus are entitled to notice and hearing.

A. Where, As Here, Non-Renewal Is Contemplated for Reasons Which Implicate the First Amendment, the Decision Must Be Preceded By Notice and Hearing.

This Court has repeatedly recognized that "the freedoms of expression must be ringed about with adequate bulwarks." *Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971); *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66 (1963). "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn." *Speiser* v. *Randall, supra*, 357 U.S. at 525. Separating "legitimate from illegitimate speech" requires "sensitive tools." *Ibid.* And the "tools" which this Court has prescribed for this purpose are notice and a hearing preceding state action.

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[17] We do not, in this brief, attempt to delineate the precise attributes which a due process hearing should possess. Since Sindermann was afforded no hearing whatsoever, his rights were violated unless he had no right to a hearing of any type. We do endorse the general conclusions of the court below that any hearing should be before an impartial tribunal and should include the right to produce witnesses and evidence and to confront and cross-examine the College's witnesses, (A. 194), preceded by notice of the reasons for non-renewal "in sufficient detail to enable him to show any error that may exist" together with "the names and the nature of the testimony of witnesses against him" (A. 193; *Ferguson* v. *Thomas, supra*, 430 F.2d at 856).

This rule was not adopted to glorify speech which is *not* protected, but to assure against infringement of speech which *is*. "Where the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Id.* at 521. The concern is that "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding . . . will create the danger that the legitimate utterance will be penalized." *Id.* at 526. Absent procedures carefully designed to distinguish the two, those who contemplate unpopular advocacy "necessarily must steer far wider of the unlawful zone. . . . In practical operation, therefore, [the absence of adequate procedures] must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free . . ." *Ibid.*

This principle has been discussed most often in contexts where the line between protected and unprotected speech is difficult to draw, e.g. loyalty and obscenity cases. As *Pickering* makes clear, the teacher's criticism of his superiors is yet another area where difficult line-drawing is required. The interests of the teacher-*qua*-citizen, and the school-*qua*-employer must be balanced (391 U.S. at 568). That balancing is not an easy process. "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal," this Court thought it not "feasible to lay down a general standard against which all such statements may be judged." (*Id.* at 569). It merely indicated "some of the general lines along which an analysis of the controlling interests should run" (*Ibid*).

Given the delicate line prescribed in *Pickering*, teachers will speak at their peril unless they are assured that procedural safeguards will precede any deprivation of employ-

ment. Can it be doubted that, in the light of Sindermann's fate, the more-than-100 other teachers at Odessa College will think twice before picking up his cudgels? Or that the restraint will be felt on speech which is clearly protected? The ax of non-renewal can fall swiftly and summarily, and those who would emulate Sindermann lack the assurance that their ouster will be accompanied by a revealing press release which furnishes the basis for a § 1983 action.

Nor is it any answer that, if Sindermann's actions were constitutionally protected, he can secure ultimate relief in a § 1983 action. Indeed, that alternative was equally available in the other situations where this Court has required predetermination hearings. The reasons for its inadequacy are obvious. Many teachers cannot afford the costs of federal court litigation. Many of those who can might reasonably fear that suing their former employer would mark them a "troublemaker" and thus impede their chances of obtaining teaching employment elsewhere.[18] Even for those prepared to run this gamut, the prospect of extended unemployment while the legal battle is fought is so high a price as to exert its own "chilling effect." Cf. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967). And even if all these hurdles are surmounted by a teacher who, undeterred, exercises his First Amendment rights and is nonrenewed, the "chilling effect" on the colleagues he leaves behind will last at least for the extended period until a legal victory is obtained. In sum, absent pre-termination procedures which assure teachers that the exercise of First Amendment rights will not result in summary dismissal, the inevitable consequence will be that teachers will steer "far wider of the unlawful zone."

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[18] That such has been Sindermann's fate is suggested by his subsequent plight. He has applied to more than 100 colleges over the past two years, but has been hired by none. His most promising prospect, Montgomery County Junior College, Maryland, fell through when this Court's grant of certiorari publicized his prior history. See p. 41, n. 27, *infra,* and affidavit printed at pp. 9-14a., *infra.*

The court below, cognizant of these considerations, declared that a teacher who believes that non-renewal was motivated by his exercise of First Amendment rights may demand a hearing *following* notice of non-renewal, but that "the teacher must bear the burden of proving that a wrong has been done" (A. 193). In two respects, this procedure falls short of that decreed by prior decisions of this Court: (1) the hearing must *precede* non-renewal; and (2) the burden of proof must rest with the State.

(1) The "root requirement" of due process is "that an individual be given an opportunity [for] a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971) (emphasis added). "[D]ue process demands that the speech be unencumbered *until* the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure . . ." *Speiser* v. *Randall, supra,* 357 U.S. at 529 (emphasis added).[19] Here, there was no governmental interest justifying a postponement of the hearing. Sindermann was permitted to continue teaching for the duration of the current term, which extended weeks beyond the date he was notified of non-renewal, and he would not have resumed teaching until the fall. Accordingly, he was entitled to a hearing prior to the decision not to renew his employment.

(2) When a State proposes to deny a privilege to one whom it alleges has engaged in unprotected speech, due process requires that the State bear the burden of proving

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[19] See also, *Bell* v. *Burson,* 402 U.S. 535, 542 (1971); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 339-341 (1969); *Goldberg* v. *Kelly,* 397 U.S. 254, 263-266 (1970); *Armstrong* v. *Manzo,* 380 U.S. 545, 550-551 (1965); *Mullane* v. *Central Hanover Tr. Co.,* 339 U.S. 306, 313 (1950).

that the speech was not protected. As this Court explained in *Speiser* v. *Randall, supra,* 357 U.S. at 525-526:

> "[W]here the burden of proof lies may be decisive of the outcome. . . . Where the transcendant value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in [unprotected] speech.
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> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding . . . will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear those burdens."

See also *Armstrong* v. *Manzo, supra,* 380 U.S. at 551.

B. Teachers in Public Education Systems Are Entitled to Notice and Hearing Prior to a Decision that They Will Not Be Renewed, Irrespective of the Reason for Non-Renewal.

In the preceding section, we have shown that because First Amendment considerations were clearly implicated in Sindermann's case he was entitled to a hearing prior to the decision not to renew his employment. We turn now to a wholly different consideration: whether teachers in public educational institutions have a right to a hearing before being non-renewed irrespective of the reason for non-renewal.

This Court has repeatedly held that "the right to be heard before being condemned by the State to suffer *grievous loss of any kind*" is a basic requisite of due process. See, e.g., *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971); *Goldberg* v. *Kelly, supra; Greene* v. *McElroy,* 360 U.S. 474 (1959). There was a time when it was thought that this doctrine was limited only to the loss of "rights," but more

recent decisions of this Court have made clear that procedural due process is required whenever the State proposes to interfere with "important interests" of the citizen, regardless whether these interests be "denominated a 'right' or a 'privilege'." *Bell* v. *Burson, supra,* 402 U.S. at 539. See also *Speiser* v. *Randall, supra; Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239, n. 5 (1957); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968).

Whether the loss of government employment is such a "grievous loss" as to warrant procedural due process is an issue upon which this Court's decisions are not consistent. Most recently, in *Connell* v. *Higginbotham,* 403 U.S. 207, 208 (1971), this Court followed the "decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." See also, *Slochower, supra,* 350 U.S. at 559; *Goldberg* v. *Kelly, supra,* 397 U.S. at 262; *Bell* v. *Burson, supra,* 402 U.S. at 539. In other cases, however, this Court's decisions have contained *dicta* looking the other way. See, e.g., *Vitarelli* v. *Seaton,* 359 U.S. 535, 539 (1959); *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 896 (1961).[20] We will discuss

[20] *Cafeteria Workers* is widely misconstrued as having *held* that public employees do not have a right to procedural due process when their job is threatened. In fact, however, its holding was very much narrower. It held only that a short-order cook employed by a private contractor in a cafeteria on a military installation was not entitled to a hearing prior to the withdrawal of her access to the installation. The Court concluded that the individual interests involved were not terribly important, as her employer was prepared to employ her at another of its restaurants (367 U.S. at 888), the withdrawal of access was not likely to injure her reputation (*Id.* at 898), there was no evidence that her "employment opportunities anywhere else" would be impaired (*Id.* at 898-899), and she was not even precluded from obtaining employment "on any other federal property" (*Id.* at 899, n. 10). The Court proceeded to balance this very limited individual interest against the government's traditional power to exercise "unfettered control" of "the internal operation of an important federal military establishment" (*Id.* at 896), and concluded *on balance* that procedural due process was not required.

herein several "interests" of the teacher which are damaged by non-renewal, and which, we contend, entitle teachers to notice and hearing prior to non-renewal.

Of course, like most constitutional protections, the "right to be heard" is not absolute. The individual's interests must be weighed against "the governmental interest in summary adjudication." *Goldberg* v. *Kelly, supra,* 397 U.S. at 263. Accordingly, we also discuss herein the competing governmental interests which must be weighed against the individual teacher's interests on procedural due process.

(1) *The Teacher's Interest in Retention of His Job.*

It can hardly be gainsaid that a teacher's loss of his job visits severe injury upon him. Teachers generally are not paid at levels enabling them to accumulate the kind of savings which would tide them over extended periods of unemployment. Thus, non-renewal threatens severe financial hardship. It threatens less tangible, but nonetheless real, consequences as well: the disruption of established associations with colleagues and students and, in a case like Sindermann's, the impossibility of pursuing one's professional career without picking up roots and moving to another city with all that that entails.[21] As this Court has recognized, cessation of wages "may as a practical matter drive a wage earning family to the wall." *Sniadach, supra,* 395 U.S. at 341-342 (1969). Exclusion from Government employment can "seriously impair [the] chance to earn a living" and is "punishment . . . of a most severe type." *U.S.* v. *Lovett,* 328 U.S. 303, 314, 316 (1946). See also *Ricucci* v. *U.S.,* 425 F.2d 1252, 1256-1257 (Ct. Claims 1970) (concurring opinion) (likening the terminated public employee to the welfare recipient in *Goldberg* v. *Kelly, supra*).

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[21] This assumes, of course, that the non-renewed teacher is able to secure other employment in his field. As we show in (3), *infra* pp. 37-41, non-renewal seriously jeopardizes the teacher's ability to obtain such other employment.

(2) *The Teacher's Right not to be Arbitrarily Terminated.*

The old notion that there is no "right" to Government employment—while not determinative in any event of the right to procedural due process—is not really accurate. For this Court has repeatedly made clear that a public employee *does* have a right not to be terminated for reasons which are "arbitrary." *Wieman* v. *Updegraff, supra,* 344 U.S. at 192:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that Constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary."

The "very essence of due process" is the "protection of the individual against arbitrary action," a protection which this Court has insisted upon for the public employee, *Slochower, supra,* 350 U.S. at 551, as well as for others whose interests are affected by State action. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *U.S. ex rel. Vajtauer* v. *Comm. of Immigration,* 273 U.S. 103 (1927); *Schware* v *Board of Bar Examiners, supra.* Thus, a termination is defective if the reasons are "wholly without support" (*Slochower, supra,* 350 U.S. at 551), if there is "no evidence which rationally justifies" the asserted basis for termination (*Schware, supra,* 353 U.S. at 246-247) and, even where a basis has evidentiary support, if there is no "rational connection" between that basis and fitness to teach. (*Id.* at 239).

The teacher's right to be free of arbitrary dismissal is meaningless, however, unless accompanied by procedural due process. For if the State need not disclose the reason for non-renewal, there is no assurance that it *has* a reason which would pass constitutional muster. And even if it has a reason, it may be wholly lacking in evidentiary support

and easily refutable—"easily", that is, if the teacher knows the reason and is accorded a hearing to refute it.[22] Indeed, absent a requirement of notice and hearing it is likely that the State, however well-intentioned, will lapse into making termination decisions without even the internal discipline of inquring whether its decision is rationally justified.

We submit that the teacher's personal stake in continued employment, and his "right" to be free of its arbitrary deprivation, are interests of sufficient importance to entitle him to notice and hearing prior to non-renewal.

(3) *Injury to Reputation and Inability to Pursue the Teaching Profession*

A number of lower courts, deterred, by the notion that there is no "right" to public employment, from holding that job retention is itself an interest deserving procedural protection, have carried the analysis further. These courts have held that "whenever there is a substantial interest,

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[22] A classic example of the dangers which would be involved were there no right to notice or hearing was presented in *Chase* v. *Fall Mountain Regional School Dist., supra.* A teacher was denied renewal because of rumors, neither investigated nor verified, that he had made sexual advances upon a female student. The Court, directing reinstatement of the teacher, stated (slip opin., pp. 21-22):

> "To dismiss a teacher on the basis of univestigated complaints and unverified rumors and to admit that the decision does not depend on the truth or falseness of the complaints and rumors is patently unjust, arbitrary, and capricious. If the possibility, let alone the probability of the truth of the facts involved is not known, a decision cannot be reasoned or based on substantial evidence. The implications of such a decision are frightening. It means that any student with a personal dislike for a teacher could bring his career to an end by a complaint wholly unjustified and unsubstantiated in fact. In the same sense, a malicious group in the community could start unsubstantiated rumors resulting in dismissal. Further, an administrator or another teacher bent on a personal vendetta could, by insidiously starting false rumors, bring about the dismissal of a totally innocent teacher."

other than employment by the state, involved in the discharge of a public employee" he is entitled to procedural due process. *Birnbaum* v. *Trussell,* 371 F.2d 672, 678 (2d Cir. 1966). A number of courts have held that the adverse effect non-retention would have upon a teacher's reputation and ability to pursue his profession elsewhere created a sufficient interest to entitle that teacher to notice and a hearing. *Roth* v. *Board of Regents,* No. 18490, 40 L.W. 2060 (7th Cir. July 1, 1971) (non-renewal of a teacher by a public college); *Shirck* v. *Thomas,* No. 18790 (7th Cir. Sept. 2, 1971) (non-renewal of a public high school teacher); *Drown* v. *Portsmouth School District,* 435 F.2d 1182 (1st Cir. 1970), cert. denied, 39 L.W. 3511 (May 18, 1971) (non-renewal of a public school teacher; held: entitled to a written statement of reasons and an evaluation report but not a hearing). See also cases discussed at pp. 39-41, *infra.*

This Court has squarely held that "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau, supra,* 400 U.S. at 437. It has likewise held that procedural due process must attend the State's denial of a person's right to pursue his profession, *Schware, supra; Konigsberg* v. *State Bar,* 353 U.S. 252 (1957), or the taking of action which would impede pursuit of a profession, *Bell* v. *Burson, supra,* 402 U.S. at 539.

The classroom is a uniquely sensitive arena,[23] and it is widely recognized that a teacher whose reputation has been clouded by non-renewal stands little chance of securing a teaching position in another school system. As the Rhode Island Commissioner of Education recently noted, in the

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[23] Teachers "have captive audiences of young minds," *Keyishian, supra,* 385 U.S. at 607, and this Court has recognized the State's intense interest in assuring the fitness of those who teach in its schools, *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952).

teaching world non-renewal is considered a "dismissal," and "dismissal [of a teacher] from his position, whether it be during a school year or at the end of a school year can mean the end of his professional career." [24] Similarly, the Chairman of the U.S. Civil Service Commission recently explained, "Being fired from government carries a stigma that prevents many employees from perhaps ever finding gainful employment again." [25] This is not mere speculation on our part. The compelling nature of the problem confronting the non-renewed teacher has been expressed poignantly in a massive number of recent court decisions. The below quoted statements are illustrative:

> "Discharge (or failure to rehire) is a blemish that can permanently scar his record and effectively limit any chance he [the plaintiff] has to be rehired as a teacher in this state. Since there is little or no reciprocity for teachers between states, such damage to his teaching credentials in his chosen profession may indeed destroy his career." *Munro* v. *Board of Education of Elk Rapids Schools*, 383 Mich. 661, 692 (Mich. Sup. Ct. 1970) (dissenting opinion of T. G. Kavanagh, J), adopted as the majority opinion of the Court upon reconsideration (No. 52, 508, decided June 18, 1971).
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> "There is no doubt that non-renewal effectively prevents a teacher from obtaining another teaching position, thereby preventing a teacher from pursuing his chosen profession." *Chase* v. *Fall Mountain Regional School Dist., supra,* at slip opin. p. 20.
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> "There can be no question that in terms of money and standing and opportunity to contribute to the educational process, the consequences of [non-renewal] to

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[24] *Domenicone* v. *School Committee,* R.I. Commissioner of Education, May 20, 1970, pp. 3, 4.

[25] Statement of Robert Hampton, *Washington Evening Star,* April 12, 1971, p. A-8.

him [the teacher]-probably will be serious and prolonged and possibly will be severe and permanent. 'Badge of infamy' is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." *Roth* v. *Board of Regents,* 310 F.Supp, 972, 978-979 (D. Wisc. 1970), aff'd., No. 18490 (7th Cir., July 1, 1971).[26] See also, *Petrullo* v. *McCain,* Civ. Ac. No. T-4850 (D. Kan. July 7, 1971) (slip. opin, at p. 5).

"The decision . . . not to reappoint and accord tenure to plaintiff has caused, and unless such decision is restrained from enforcement, will continue to cause, the plaintiff damages to his professional reputation and standing *and severely hamper his opportunities for employment* at other institutions of higher learning, for which there is no adequate remedy at law." *Auerbach* v. *Trustees of the Calif. State Colleges,* Civ. Ac. No. 71-1126-F (C.D. Calif., August 18, 1971) (slip opin. at p. 6).

"It is fairly inferable that one reason, if not the only one, why plaintiff has been unable to secure employment as a public school teacher is because he was dismissed by the Monson school committee for no stated reasons. After remaining unemployed for six weeks plaintiff secured a factory job with Springfield Molders Company at $75 per week which he held for a period of ten weeks; since then he has earned $80 per week with a car manufacturing firm." *Lucia* v. *Duggan,* 303 F.Supp. 112, 116 (D. Mass. 1969).

"The teacher, particularly one at the outset of his career, is in the position of having invested in prepara-

[26] In affirming, the Seventh Circuit observed: "We think the district court properly considered the substantial adverse effects non-retention is likely to have upon the career interests of an individual professor . . ." (slip opin. at p. 4).

tion for a career which depends mainly on the willingness of public bodies to employ him. Such willingness, as the complaint alleges, is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher." *Drown* v. *Portsmouth School District, supra,* 435 F.2d at 1184.

In view of the foregoing, it is not surprising to note that Sindermann has suffered this same fate. In the two years since his non-renewal Sindermann has applied to more than 100 colleges and universities, and has yet to receive an offer from one.[27] See also the fate of the teacher in *Orr* v. *Trinter,* No. 71-249, petition for certiorari, p. 4.

The foreseeable and actual consequences of what we have explained above is that the non-renewal of any teacher carries with it substantial likelihood of serious employability problems. The dilemma confronting the teacher is further compounded, as reflected by the instant case, because it is the nature of § 1983 actions that a teacher will seek relief *immediately* following notice of non-renewal at a time when the true magnitude of the teacher's unemployability is not yet provable.[28] The fact that this fate is predictable — albeit not provable at formative stages of the litigation — further buttresses strongly the contention that the adverse effect nonretention visits upon a teacher's ability to pursue his profession creates a sufficient interest to entitle him to *pre*-termination notice of the reasons for non-renewal and the opportunity for a hearing. The requirements of due process, as this Court has recognized in other circumstances where like consequences have been visited upon individuals, permit nothing less.

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[27] This information is contained in an affidavit annexed to this brief (*infra, pp.* 9-14a.)

[28] Here, for example, the Court can only obtain such information from sources outside the record made in the district court.

(4) *Preserving Academic Freedom*

We have previously shown that where (as here) the State acknowledges that non-renewal has First Amendment implications, notice and a hearing are required. But few teachers terminated for their views will be blessed, as Sindermann was, with so candid an acknowledgment by their employer. The college bent upon eradicating from its faculty those with unpopular views, is far more likely to accomplish its end by unexplained non-renewals.

If teachers are not entitled to notice and hearing upon non-renewal, "academic freedom" will exist in name only. Few teachers will be bold enough to voice unpopular opinions, knowing that they can be denied renewal without explanation, and that they will receive neither notice nor a hearing in which to test the legitimacy of such action. The threat of such summary job loss inevitably must "cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents, supra,* 385 U.S. at 603. It is "a highly effective *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living . . ." *Id.* at 601.

The Constitution places an extremely high value upon academic freedom. *Id.* at 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . 'The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools.' "

This Court has warned against State interference with "that free play of the spirit which all teachers ought especially to cultivate and practice." *Id.* at 601; *Wieman* v. *Updegraff, supra,* 344 U.S. at 195 (concurring opinion of Mr. Justice Frankfurter).

"The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools . . ." *Keyishian, supra,* 385 U.S. at 604. Plainly, as the Seventh Circuit has recently declared, teachers are entitled to notice and a hearing when non-renewal is contemplated, "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." *Roth* v. *Board of Regents,* No. 18490 (7th Cir., July 1, 1971). See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1453 (1968).

C. In the Usual Case (As Here) There Are No Overriding Governmental Interests Precluding Notice and a Hearing.

We have shown that teachers have interests at stake of such importance as to justify procedural due process when non-renewal is contemplated. It remains to determine whether those interests outweigh "the Governmental interest in summary adjudication." *Goldberg* v. *Kelly, supra,* 397 U.S. at 263.

One possible Governmental concern — that a hearing requirement would impose an unmanageable administrative burden — is clearly refuted by actual practices in this country. Almost all states provide "tenure" to those teachers who have taught in a school system for a specified number of years, affording them a statement of reasons and a hearing before their employment can be terminated at the end of a school year;[29] indeed, eleven states expressly provide these procedural protections to *all* primary and secondary

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[29] As of October, 1970, teacher tenure laws were in effect on a state-wide basis in 39 states and the District of Columbia, and on a less than state-wide basis in six other states. NEA Research Bulletin, March 1971, pp. 17-18 (National Education Association).

school teachers, irrespective of whether they have tenure.[30] One of these eleven states is Texas. Thus, had Sindermann been a grade school teacher his right to a hearing would have been assured by statute. It can hardly be argued that administrative inconvenience precludes affording procedural due process to the much smaller number of teachers in higher education. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 304-305 (1936); also, Cf. *Bell* v. *Burson, supra,* 402 U.S. at 540-541 and cases cited therein.

A second possible concern, the one most often voiced by the states, is that affording hearings will deprive states of the flexibility necessary to assure selection of the optimal teaching staff. This fear, we submit, is wholly imagined. Granting procedural rights to teachers does not narrow the *substantive* grounds upon which decision can be made. Teachers may be denied renewal for any reason whatsoever, except those substantively precluded by the federal Constitution or by state law. The states lose no flexibility because teachers must be told the reason and given an opportunity to be heard. To the extent such procedures force a state to articulate the reasons for not renewing a teacher, where it might otherwise have proceeded to nonrenew without a clear understanding of its own reasons, this can only be counted as a gain for the state as well as the

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[30] Ten states provide notice and hearing to all teachers (whether or not tenured) by statute: Alaska, Arkansas, California, Connecticut, Iowa, Nevada, North Dakota, Rhode Island, Texas, and Washington Alaska Stat., tit. 14, ch. 20, § 180 (1966); Ark. Stat. Ann. § 80-1304(b), (Supp. 1969); Calif. Educ. Code § 13443 (West 1969); Conn. Gen. Stat. Ann. § 5-242 (Supp. 1969); Iowa Code Ann. § 279.13 (Supp. 1971); N.Dak. Code § 15-47-38 (Supp. 1969); R.I. Gen. Laws Ann. § 16-13-4 (1956); Texas Code Ann. § 21-204 (1969); Wash. Rev. Code Ann. § 28.67.070 (1964). In Maryland, the State Board of Education has decreed the same result by administrative decision. *Dietert* v. *Board of Education of Talbot County* (St. Board of Educ. May 26, 1971).

teacher: the state, after all, has an interest in assuring that its citizens are not the victims of arbitrary treatment at its hands. Cf. *Goldberg* v. *Kelly, supra,* 397 U.S. at 264-265. Likewise, the state will derive substantial benefit from this safety valve principle; it is assured that those teachers who are non-renewed are in fact individuals who have been demonstrated not to have satisfied the substantive standards for continued employment in the school system.

Finally, it has been argued that according procedural due process would destroy the distinction between tenured and non-tenured teachers. *Orr* v. *Trinter,* No. 20721 (6th Cir. June 16, 1971), petition for certiorari pending, No. 71-249. While it would be a sufficient answer that this distinction is not one of constitutional dimensions, and thus cannot stand in the way of constitutional rights, it happens not to be accurate. The essential distinction between tenured and non-tenured teachers is not in the procedures accorded to them, but in the substantive grounds for which they may be terminated. Whereas a non-tenured teacher may be terminated for any reason not offensive to the federal Constitution, state laws normally provide that the tenured teacher can lose his job only for severe misconduct, e.g. "for gross inefficiency or immorality; for willful and persistent violation of reasonable regulations of the board of education; or for other good and just cause."[31]

In sum, there is no "Governmental interest in summary adjudication" which outweights, in the usual case, the teacher's right to notice and hearing prior to non-renewal. Of course cases can be imagined which would be exceptions to this rule — a school administration is not required to leave an accused child molestor in the classroom while he is being accorded procedural due process. But in the routine case — as this one is — the balance clearly tips in favor of the teacher.

[31] Ohio Revised Code, Section 3319.16.

D. A Teacher Who Is Non-Renewed Without Notice and Hearing Is Entitled to Automatic Reinstatement and Back Pay, Without Consideration of Whether the Dismissal Was Substantively Justified.

In its opinion, the court below suggested (albeit it did not decide) that if it was ultimately determined that Sindermann had been denied procedural due process the remedy was to provide it to him now — i.e. to withhold a decision on the substantive issues until Sindermann was afforded an administrative hearing (A. 195-196). We submit that this is the wrong approach. If non-renewal was procedurally defective, because not preceded by notice and hearing, the appropriate remedy is reinstatement with back pay, without consideration of whether the non-renewal was substantively justified.[32]

Our position is that dictated by prior decisions of this Court. Repeatedly, this Court has recognized that a procedurally-defective decision must be "set aside" and the "slate" "wiped . . . clean," *Armstrong* v. *Manzo, supra,* 380 U.S. at 552, without consideration of the underlying substantive issues.

Two of these decisions have involved dismissals of public employees, in which the Court found procedural defects of a statutory (rather than constitutional) magnitude. In each, automatic reinstatement was the prescribed remedy. In *Vitarelli* v. *Seaton, supra,* a federal employee dismissed without adherence to procedures set forth in a government

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[32] Indeed, in the instant circumstances provision of an administrative hearing would be even more difficult than is usually the case. In our view, the Employer can never sit as an impartial tribunal when called upon to resolve employer-employee conflicts. Moreover, even assuming that the Board of Regents might otherwise constitute an impartial tribunal to hear cases of this type, it could not be such here. For its impartiality is compromised, both because it has prejudged the case, Cf. *Goldberg* v. *Kelly, supra,* 397 U.S. at 271, and because Sindermann's actions were on issues where he opposed the Board's stated positions. See also *Pickering, supra,* 391 U.S. at 578, n. 2.

regulation was ordered reinstated *without consideration of whether the dismissal was substantively justified.* The Court explained (359 U.S. at 545, 546):

> "Because the proceedings attendant upon petitioner's dismissal from government service . . . . fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was *illegal and of no effect.*
>
> * * *
>
> "It follows from what we have said that *petitioner is entitled to the reinstatement which he seeks,* subject, of course, to any lawful exercise of the Secretary's authority *hereafter* to dismiss him from employment . . ." (emphasis added).

Similarly, *Greene* v. *United States, supra,* involved an employee of a private contractor whose security clearance was revoked by the Government in a procedurally defective manner, and who consequently lost his job. He sued for lost wages, under a Government regulation providing for restitution to private employees who are injured by wrongful revocations of security clearance. The Government resisted payment, arguing "that before restitution is allowed there must be a further showing . . . that the challenged revocation of access authorization was not only procedurally incorrect, but substantively wrong." (376 U.S. at 159). The Court rejected this argument, and awarded payment, explaining (376 U.S. at 161-162):

> "The . . . language [of the regulation] does not reasonably warrant the implication that a claimant, who has sustained the burden of demonstrating that the government acted without authority in revoking his clearance without a fair procedure, must take on the additional burden of showing at a later time that if he had been afforded fair procedures in the first

instance he would have been able to demonstrate successfully that he was entitled to access authorization. On the contrary, the regulation should be interpreted to mean that where a claimant establishes that the government has improperly denied clearance by its failure to provide fair procedures, the government is liable and petitioner is entitled to recover 'in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance.'

"In a case such as the present, where the Government has acted without authority in causing the discharge of an employee without providing adequate procedural safeguards, *we should be reluctant to conclude that a regulation, not explicitly so requiring, conditions restitution on a retrospective determination of the validity of the substantive reasons for the government action — reasons which the employee was not afforded an adequate opportunity to meet or rebut at the time of his discharge*" (emphasis added).

The policy considerations underpinning this remedy were elaborated in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365, n. 18 (1963):

"The principle that a private association's failure to afford procedural safeguards may result in the imposition of damage liability *without inquiry into whether the association's action lacked substantive basis* is reflected in many state court decisions, resting on various theories of liability. [Citing numerous cases.] The precedents cited undoubtedly rest on a recognition that an according of fair procedures is of fundamental significance, that serious and irreversible economic injury may result from their denial . . . and that *a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what*

the outcome would have been had the procedural safeguards been afforded in the first instance. The conditioning of relief for the procedural breach on a finding that a concomitant substantive breach occurred might well, therefore, result in an ultimate wrongful denial of recovery" (emphasis added).

Likewise, in *Greene* v. *Howard University,* 412 F.2d 1128 (D.C. Cir. 1969), the court, finding that teachers had been denied renewal without being accorded their *contractual* procedural rights, granted them backpay without permitting the university to prove that the discharges were substantively justified:

> "'The legal injury done by that failure [to provide a hearing] could not now be repaired by affording [the teachers] the hearing which they sought and were denied at the time their reappointments were withheld" (412 F.2d at 1135).

In several § 1983 cases, the district courts have ordered automatic reinstatement and back pay following a procedurally defective dismissal. In *Lucia* v. *Duggan,* 303 F.Supp. 112, 119 (D. Mass. 1969), the court reasoned:

> "Plaintiff is entitled to the benefits of his position as a teacher in the Monson Public Schools, including salary, *unless and until* he is *lawfully* separated from that position" (emphasis added).

Similarly, in *Olson* v. *Regents of University of Minnesota,* 301 F.Supp. 1355 (D. Minn. 1969) the court, expressing "no opinion on the merits of plaintiff's discharge" and making "no finding as to whether or not his dismissal was for a just cause," nevertheless ordered "that plaintiff be reinstated as a university employee with such reinstatement retroactive to the [date of dismissal] . . . This decision [does not] limit defendant from taking further action as to

plaintiff's dismissal in accordance with [due process]." See also *George* v. *Conneaut Board of Educ.*, Civ. Ac. No. C 70-398 (N.D. Ohio, Aug. 20, 1971), and *Patrone* v. *Howland Local Schools Board of Educ.*, Civ. Ac. No. C 70-819 (N.D. Ohio, Aug. 20, 1971).

In sum, if the failure to accord Sindermann a hearing was a denial of procedural due process, the appropriate remedy is reinstatement and back pay, and not simply affording him a hearing several years late.

IV. THE FEDERAL COURTS HAVE JURISDICTION OVER THIS ACTION

At no time throughout the course of this litigation have defendants challenged the existence of federal court jurisdiction over this action. Nevertheless, we feel compelled to say a few words about the subject, because this Court may raise the jurisdictional question *sua sponte*, and has a closely related jurisdictional question before it in *Lynch* v. *Household Finance Corporation*, No. 70-6356, probable jurisdiction noted, 39 L.W. 3375 (March 1, 1971).

42 U.S.C. § 1983 establishes that every person who, under color of state law, subjects another "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 28 U.S.C. § 1343(3) vests the federal district courts with jurisdiction "to redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States . . ."

On its face, 28 U.S.C. § 1343(3) would appear to grant federal jurisdiction over every allegation of violation of 42 U.S.C. § 1983, a conclusion which is strengthened by the knowledge that the provisions were adopted simul-

taneously, in the Civil Rights Act of 1871, 17 Stat. 13. Nevertheless, in a series of recent decisions, the Second Circuit has held that the jurisdictional scope of 28 U.S.C. § 1343(3) does not encompass all alleged violations of 42 U.S.C. § 1983 but, rather, only those which allege deprivations of "liberty" as distinguished from "property." *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); *Tichon* v. *Harder*, 438 F.2d 1396 (2d Cir. 1971); *Lynch* v. *Household Finance Corp.*, 318 F.Supp. 1111 (D. Conn.) (Three-judge court), probable jurisdiction noted 39 L.W. 3375 (March 1, 1971); *Canty* v. *Board of Education*, No. 71-1312 (2d Cir., Sept. 3, 1971).

The Second Circuit's "liberty-property" distinction has not been adopted by any other court, and is inconsistent with this Court's decision in *Wisconsin* v. *Constantineau*, *supra*, 400 U.S. at 437-438 (1971), upholding jurisdiction under 28 U.S.C. § 1343(3) over a claim of damage to reputation (surely "property" rather than "liberty") visited under color of state law. For the reasons more fully set forth in the Brief for Appellants in *Lynch*, we submit that federal jurisdiction extends to all claims cognizable under 42 U.S.C. § 1983.[33]

In any event, the instant case is one which, even under the Second Circuit's formulation, falls on the "liberty" side of the ledger. The principal interest which Sindermann claims has been violated is his exercise of the rights protected by the First Amendment. Those are rights of

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[33] Moreover, since the complaint in this case alleges actual damages far exceeding $10,000, federal jurisdiction also exists under 28 U.S.C. § 1331. The Second Circuit's "liberty-property" distinction was formulated in the belief that Congress did not want property claims of less than $10,000 adjudicated in the federal courts. *Eisen*, *supra*, 421 F.2d at 564, a concern wholly inapplicable to the instant case.

"liberty," as the Second Circuit recognized. *Eisen, supra,* 421 F.2d at 564, citing *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); see also *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 506 (1969); *Shelton* v. *Tucker, supra,* 364 U.S. at 484-485 (1960); *Wieman* v. *Updegraff, supra,* 344 U.S. at 196 (concurring opinion of Mr. Justice Frankfurter). Additionally, Sindermann contends that the defendants' actions will impair his ability to pursue his profession as a teacher, and "to pursue a calling of one's choice" is, the Second Circuit acknowledges, a "personal liberty." *Eisen, supra,* 421 F.2d at 565; *Tichon, supra,* 438 F.2d at 1401, 1402.[34]

CONCLUSION

For the reasons set forth hereinabove, this Court should affirm the Fifth Circuit's conclusions (1) that the absence of tenure or a contractual right to reemployment does not foreclose a suit alleging that non-renewal was visited for constitutionally impermissible reasons, and (2) that on the existing record summary judgment could not be granted in favor of defendants on this allegation.

With respect to the procedural due process issues, this Court should hold that Sindermann was unconstitutionally denied a hearing prior to non-renewal, and that the remedy

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[34] In *Tichon,* the Second Circuit held that a probationary social worker who had no "reservoir of standing and reputation for skill, honesty and trust" could not contend that non-renewal impeded her "personal liberty" to pursue her calling. On this attenuated basis it distinguished its prior decision in *Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir., 1966), upholding jurisdiction over a physician's claim that he was denied procedural due process when discharged without a hearing because of the impact upon his future employability. While we believe this distinction invalid, Sindermann meets the Second Circuit's test for jurisdiction: he had been employed as a teacher in the public colleges of Texas for ten years, and thus had the requisite "reservoir standing and reputation."

therefor should be reinstatement and back pay without consideration of whether the non-renewal was substantively justified.

Respectively submitted,

MICHAEL H. GOTTESMAN
GEORGE H. COHEN
DENNIS D. CLARK
BREDHOFF, BARR, GOTTESMAN,
COHEN & PEER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
WARREN BURNETT
RICHARD J. CLARKSON
BURNETT & CHILDS
P.O. Box 3707
Odessa, Texas 79760
Attorneys for Respondent

P.O. Box 818
Baytown, Texas

Robert Sindermann
President, T.J.C.T.A.
P.O. Box 3752
Odessa College
Odessa, Texas 79760

Dear Bob:

The hearing on our Academic Freedom and Tenure bill is set for April 23, in Austin. It is imperative that you as T.J.C.T.A. President and member of the Legislative Committee attend this hearing. The presidents of T.A.C.T. and A.A.U.P. will represent their organizations at the *Tenure Bill* hearing, so T.J.C.T.A. should exhibit equal interest.

If I can help you in any way do not hesitate to call me.

Respectfully,

DELTON GOODIN
Legislative Committee Chairman
T.J.C.T.A.

ODESSA COLLEGE

Founded in 1946

P.O. Box 3752
Odessa, Texas 79760

April 25, 1969

Mr. Bernhardt T. W. Sedate
Acting Chairman
Social Science Dept.
Odessa College

Dear Mr. Acting Chairman:

Although there is probably no need for this, in view of my request to you of April 9 last, and of my submission to Dr. Rodgers and Dean Chisum of supporting documents to justify my absence from this campus on two dates, April 23 and April 28, 1969, I want to officially notify you that I shall need to be in Austin on *Official* TEXAS JUNIOR COLLEGE TEACHERS ASSOCIATION business on Monday of next week, and will need to be substituted for. I will be glad to pay the substitutes, myself, at the going rate. As I understand it, you want to assign them. My classes Monday are at 9 a.m., Gov't. 232.2, WH111, Texas Legislative Process, and at 11 a.m., Gov't. 232.4, WH111, Texas Legislative Process, and at 2 p.m., Gov't. 232.7, DH205A, Texas Legislative Process. I have talked with various members of the Social Science staff, and several of them are available at each of these times. I will give names and times later in this epistle.

The supporting documents which I submitted, first to Dr. Rodgers in the original and then to Dean Chisum as Xerox reproductions, are:

(1) Reproduced letter from Senator Bill Moore, Chairman of the Senate State Affairs Committee, *inviting me to testify* before his committee on both SB512, Academic Freedom and Tenure for junior and

senior college teachers, scheduled to be heard on Wednesday, April 23, 1969 at 2 p.m. (postponed, and re-scheduled for 2 p.m. on Monday, April 28.) and on SB531, creating Permian State College, to be heard also on April 28 before the State Affairs Committee at 2 p.m.

(2) Reproduced letter from State Sen. Oscar Mauzy, sponsor of our Academic Freedom and Tenure bill in the Senate, expressing the hope that I would be there to testify on SB512 when it is heard by the State Affairs Committee.

(3) Reproduced letter from Prof. Delton Goodin Chairman, Legislative Committee, TJCTA, stating that it is *imperative* that I be there to testify when SB512 is heard, in the name of our teachers' organization.

Dr. Rodgers suggested that I should have the Chairman of our TJCTA Legislative Committee, Prof. Delton Goodin, represent our organization before the State Affairs Committee. This proved to be impossible. Chairman Goodin also will be unavailable to testify on Monday, April 28, owing to the necessity to take his three children to the doctors' office or hospital for tonsillectomies. If I do not testify, no one from our organization will, and it is *our* bill.

(4) Reproduced letter from Prof. Colfrey Connally, State President, Texas Conference, AAUP, which appoints me to a position on Committee "A" of the Texas AAUP, which is the committee which investigates complaints from college teachers regarding violations of Academic Freedom and Tenure. I accepted the position, of course.

As I indicated to both Dr. Rodgers, orally, and to Dean Chisum in a letter the same day, I regard this invitation to testify from an esteemed member of the Texas Legislature

as something not to be lightly dismissed or refused, in the interest of good relations with the Texas Legislature on behalf of our teachers association as well as possibly for this college. I am obliged to go, as an official obligation of my office in TJCTA.

I am notifying you today, Mr. Acting Chairman, that I will be following through on that invitation from Sen. Moore, on Monday, April 28, 1969, as the Dean and Dr. Rodgers were officially put on notice previously by the display of Sen. Moore's letter to both men.

I have endeavored to follow what is standard practice for our other TJCTA Legislative Committee members; especially Chairman Goodin and Dean Johnson, of Lee College, to arrange for one's own substitutes when one must go to official duty in Austin, but have found that those who substituted for me last Wednesday have been intimidated by you so that they are willing but reluctant to substitute for me next Monday. Needless to say, I do not appreciate this, and trust that such will *not* be the case on Monday next, when I shall again be absent and will need substitution. I shall be missing my classes for only the third time this school year, and it is very much in line with my official duties as state TJCTA President.

Perhaps some college administrators are not aware of what we were elected for, at the TJCTA convention in Fort Worth in February. The whole purpose of wiping out the old leadership of TJCTA was to make a *professional organization* out of TJCTA; something which it has *never* been. Many of us junior college teachers were thoroughly disgusted with TJCTA, as was Dr. James Reynolds, and we were resolved that the organization had to be either disbanded, or it had to be improved. We chose to take the more responsible path, to reorganize the whole structure and mode of operation of TJCTA, by taking the reins of leadership and re-directing it along *professional* lines.

As any political or educational realist of the state knows, the *major* effort at improving the professional status of any group or organization in Texas *must* be made in Austin, in the Texas Legislature. As both our State Representative, Ace Pickens, and our State Senator, Pete Snelson, have told me, *no one* has ever approached the Texas Legislature in the interest of the Junior College Teachers of Texas. They have also plainly admitted that "the wheel that squeaks the loudest down here gets the most grease." Thus far, in the long history of the junior college movement in Texas, *no one,* to my knowledge, has ever gone to bat specifically for the interests of the junior college teachers in this state, before the Legislature. This, we are determined to do, come hell or high water. The leadership of TJCTA is going to let the Texas Legislature know, in a sound, intelligent, sensible manner, that we junior college teachers exist, and that we have an association that is interested in our well-being, by lobbying activities in Austin. I was elected to "get this organization moving," and I fully intend to do just that. No previous TJCTA President, to my knowledge, ever appeared before the Texas Legislature on behalf of his fellow teachers. I am the first to do this, but not the last. This failure on the part of previous leaders of this organization is one of the things handicapping the advancement of the professional interests of junior college teachers in Texas. The failure is understandable, because most of the previous leaders were teachers of Business Administration, Math, English, etc., with no grasp of the realities of Texas higher education, and of the fact that it is all wrapped up in politics. As some of us know only too well, higher education in Texas is basically dependent upon political maneuvering, for better or worse. Those who "politick" best down in Austin get what they want, in the field of higher education. So, in order for our organization to be at all effective, a major lobbying and legislative approach is *vital.* If we are denied that opportunity to represent effectively our own in-

terests in Austin, we are being denied any hope of advancing this profession. Administrators *cannot* be expected to adequately represent the interests of teachers on all issues. This current division over our Academic Freedom and Tenure bill is a clear example of that fact. Apparently, this is not as crucial a problem to some as it is to us classroom teachers.

The second part of our professionalization thrust is in the area of Professional Development. Here, we intend to make our general, business, and section meetings of TJCTA far more meaningful than they have ever been in the past, for most of us. We are going to encourage the selection of better-caliber speakers, rather than tired college presidents and humorous (?) dentists from San Marcos, fresh from the Knife and Fork Club circuit. I am acquainted with the Ass't. U. S. Commissioner of Education, and plan to invite him to speak, as well as people in the Austin area of the stature of Walt Rostow or the former President, himself. We are also going to have professional papers delivered at section meetings, and will publish them in the *Messenger,* making that mazaine worth reading for the *first* time.

As you can readily see, the new leadership of TJCTA has an ambitious program before it, and we must move quickly to effect it, as we have only this year, for sure, to prove that we are equal to the challenge we posed for ourselves by ousting the old leaders. I cannot understand or appreciate any administrators who would not want to assist and support us in this effort, unless they do not want to see junior college teachers emerge as true *professionals.* Our first major effort, obviously, has to be directed to the Legislature in AUSTIN, while the boys are in session. Then, after the boys have adjourned, we will turn our leadership efforts to beefing up the professional development aspects of our operation. We hope to have the cooperation of college administrators in what we are doing. If

we do, a great deal can be accomplished which will benefit administrators as well as teachers.

So, in sum, I am officially requesting you, as my *Acting* Chairman, to assign substitutes in my classes scheduled for next Monday, while I am in Austin on official TJCTA business. I will reimburse them, and no cost whatever to the college is involved. The following people are off duty at the following times: 9 a.m., Gov't. 232.2—WH111 Frank Cornes; Dick Kennedy; 11 a.m., Gov't. 232.4—Dave Yedding; 2 p.m., Gov't 232.7, Dick Kennedy. Helen Kennedy is also available at all of those times to substitute. I see no reason why substitutes cannot be assigned, since they are both available and willing. I have informed each of them as to what point in the course we are discussing, but for some strange reason they seem to feel that they will be jeopardizing their future positions at this college, if they "volunteer" their services without the request coming from you. I trust that this "strange reason" will either resolve itself over this week-end, before Monday, or that you will see fit to ask these people to substitute for me. I DON'T BELIEVE THEY WOULD BE JEOPARDIZING THEIR FUTURE HERE AT ODESSA COLLEGE, BY SUBSTITUTING FOR ME MONDAY, DO YOU?

Sincerely yours,

ROBERT SINDERMANN
President, Texas Junior College
Teachers Association, 1969-70.
Lecturer in Government,
Social Science Dept.,
Odessa College

May 21, 1969

Dr. Jack Rodgers, President
Odessa College
P.O. Box 3752
Odessa, Texas 79760

Dear Dr. Rodgers:

Thank you for your letter of May 19, 1969, notifying me that the Board, upon your recommendation, had voted not to renew my contract with Odessa College for the next school year, 1969-70, at the May 6, 1969 meeting of the Board. In response to this, I would like to formally request that both you and the Board of Regents reconsider this action, and not terminate my contractual relationship with Odessa College without first following all of the procedures recommended by the Coordinating Board, College and University System, for teacher dismissal cases. These aforementioned procedures include a meeting with the college administrators at which I am informed of the charges against me, followed by a hearing before a committee of faculty members, to be followed (if charges are sustained at this proceeding) by a hearing before the Board of Regents; said hearing to be conducted in public, and with my full right to advice of counsel of my own choosing to be respected.

I should appreciate hearing from you in response to this request, at your earliest opportunity.

Very truly yours,

ROBERT SINDERMANN
1202 E. 51st St.
Odessa, Texas 79760

AFFIDAVIT

September 14, 1971
8503 Jamestown Drive
Austin, Texas 78758

To Whom It May Concern:

I, Robert Paul Sindermann, of 8503 Jamestown Drive, Austin, Texas, do solemnly hereby attest that I made application in good faith to all of the institutions of higher education listed on the attached sheets, following the termination of my teaching contract at Odessa College in May, 1969, and that I was not offered a teaching contract by any of the herein-named institutions, during these past two years and three months.

I have sought in vain to regain my position in the academic world, where I had some ten years' college-level teaching experience and the rank of Lecturer (A.B.D.) at the time of dismissal by Odessa College. I hereby attest that it is my firm belief that the cause of my lack of success in locating a position; especially in the case of the junior colleges, is the lawsuit that I have been involved in since May, 1969, with Odessa College officials.

Sworn this date

ROBERT PAUL SINDERMANN
8503 Jamestown Drive
Austin, Texas 78758

BARBARA CEARLEY

A. *Colleges Applied to in 1969:*

Alvin Junior College, Alvin, Texas
Amarillo College, Amarillo, Texas
Angelina College, Lufkin, Texas
Angelo State University, San Angelo, Texas

Annunciation College, Victoria, Texas
Arlington State College (University of Texas at Arlington), Arlington, Texas
Bee County College, Beeville, Texas
Blinn College, Brenham, Texas
Borger Junior College, Borger, Texas (Frank Phillips College)
Brazosport Junior College, Freeport, Texas
Brownsville Junior College (Texas Southmost College, Brownsville, Texas)
Central Texas College, Killeen, Texas
Cisco Junior College, Cisco, Texas
Clarendon Junior College, Clarendon, Texas
College of the Mainland, Texas City, Texas
Concordia Lutheran College, Austin, Texas
Cooke County Junior College, Gainesville, Texas
Del Mar College, Corpus Christi, Texas
El Centro College, Dallas, Texas
Ft. Worth Christian College, Ft. Worth, Texas
Galveston Community College, Galveston, Texas
Grayson County Junior College, Denison, Texas
Gulf Coast Bible College, Houston, Texas
Henderson County Junior College, Athens, Texas
Hill Junior College, Hillsboro, Texas
Howard County Junior College, Big Spring, Texas
Incarnate Word College, San Antonio, Texas
Kilgore Junior College, Kilgore, Texas
Lamar State College of Technology, Beaumont, Texas
Laredo Junior College, Laredo, Texas
Lee College, Baytown, Texas
Lubbock Christian College, Lubbock, Texas
McLennan Community College, Waco, Texas
Midwestern University, Wichita Falls, Texas
Navarro Junior College, Corsicana, Texas
Pan American College, Edinburg, Texas
Panola Junior College, Carthage, Texas

Paris Junior College, Paris, Texas
Ranger Junior College, Ranger, Texas
St. Edwards University, Austin, Texas
St. Phillips College, San Antonio, Texas
San Antonio College, San Antonio, Texas
San Jacinto Junior College, Pasadena, Texas
Schreiner Institute, Kerrville, Texas
South Plains College, Leveland, Texas
South Texas Junior College, Houston, Texas
Southwestern Assemblies of God College, Waxahachie, Texas
Southwestern Christian College, Terrell, Texas
Southwestern University, Georgetown, Texas
Southwest Texas Junior College, Uvalde, Texas
Southwest Texas State University, San Marcos, Texas
Stephen F. Austin State University, Nacogdoches, Texas
Sul Ross State University, Alpine, Texas
Tarleton State College, Stephenville, Texas
Tarrant County Junior College, Ft. Worth, Texas
Temple Junior College, Temple, Texas
Texarkana College, Texarkana, Texas
Texas Christian University, Ft. Worth, Texas
Texas College, Tyler, Texas
Texas Lutheran College, Seguin, Texas
Texas Technological College, Lubbock, Texas
Tyler Junior College, Tyler, Texas
Victoria College, Victoria, Texas
Weatherford College, Weatherford, Texas
Wharton County Junior College, Wharton, Texas

Plus about ten out-of-state four-year institutions whose names escape me.

B. *Colleges Applied to in 1970:*

American University, Washington, D.C.
Antioch College, Antioch, Ohio
Catholic University, Washington, D.C.

George Washington University, Washington, D.C.
Georgetown University, Washington, D.C.
Howard University, Washington, D.C.
University of Maryland, College Park, Maryland
Marjorie Webster Junior College, Washington, D.C.
Northern Virginia Community College, Annandale, Virginia
Johns Hopkins University, Baltimore, Maryland
University of Texas of the Permian Basin, Odessa, Texas
Saginaw Vallege College, University Center, Michigan

C. *Colleges Applied to in 1971:*

Montgomery College, Rockville, Maryland (See attached explanatory note)
Antioch College, Yellow Springs, Ohio
University of Dayton, Dayton, Ohio
Depauw University, Greencastle, Indiana
University of North Carolina, Chapel Hill, North Carolina
Saint Francis College, Biddeford, Maine
University of Southern California, Los Angeles, California
Institute of Suburban Affairs, Inc., Manhasset, New York
Grand Valley State College, Allendale, Michigan
Universal Reference System, Princeton, New Jersey
Kutztown State College, Kutztown, Pennsylvania
Villa Julie College, Stevenson, Maryland
West Virginia University, Morgantown, West Virginia
Windham College, Putney, Vermont
Prairie View A&M College, Prairie View, Texas
Albion College, Albion, Michigan
Trenton State College, Trenton, New Jersey

The most serious consideration that I have received for a position in the academic world was given me this year by Montgomery Junior College, Rockville, Maryland. I began negotiating with this college in March, 1971, while still in Washington, D.C. In May, I was flown up to Maryland for an interview at college expense. I was told by the Depart-

ment Chairman, Mrs. Lomax, that I was the one they had selected out of a field of 125 applicants to teach for them this fall. I bargained hard for a decent salary to meet the high cost of living in the Washington area, and the college officials met my demands.

The Dean, Mr. Wayne Hoof, negotiated with me throughout the summer, indicating the need to clear my appointment with the President, who was off on vacation, and the Board, which was not meeting during the summer months. I was assured by both the Department Chairman and the Dean that they would consider me on my merits as a teacher, without regard to my pending lawsuit situation. After negotiations had progressed fairly well, and *almost* to the contract-offering stage, the U.S. Supreme Court announced that it would hear my case during the coming fall term. This changed things, for Montgomery College. They became concerned about publicity surrounding a possible decision during this school year by the High Court. It became imperative now for the President to discuss my appointment with the Academic Dean, and with the Board members. The Dean finally suggested a temporary, one-year appointment to me, and I agreed, to clear away the "red tape." In the final analysis, it became impossible for the college officials to clear my appointment with the President and Board members in time for me to start the fall semester teaching at Montgomery College. The Social Science Department Chairman and members remained firm in their recommendation that it be me or no one, so no one was hired to fill the vacancy, and they will now have to recruit part-time instructors to fill the gap. I am still under possible consideration, I believe, for next February (probably not feasible; in terms of moving my family at mid-year, or taking up teaching duties at mid-year), or for the fall of 1972. They are very obviously leery of me, until my court case is finally resolved, one way or the other.

This was my best opportunity of a teaching job since I was released at Odessa College in June, 1969, and this experience leads me to believe that it is now pointless for me to apply for a teaching job anywhere in the United States, for every college will want to know all about my court suit, as Montgomery College officials did, and they will shy away, not wanting to hire me, until my situation is finally resolved. They may talk a good game, as Montgomery College did, but in the final analysis they will chicken out. I cannot re-enter the teaching profession until the courts act.

ELEVATE ODESSA COLLEGE

A MEANINGLESS BATTLE OVER SITE?

(SEE CHAMBER OF COMMERCE AD IN ODESSA AMERICAN 3-1-69)

Thank You Chamber of Commerce College Committee!

YOU EXPLAINED YOUR POSITION PERFECTLY FOR ECTOR AND MIDLAND COUNTY CITIZENS!

YOU SAY YOU WORKED FOR 10 YEARS TO BRING HIGHER EDUCATION TO ODESSA?

THE REST OF US HAVE WORKED (AND PAID) FOR 23 YEARS

We Have Followed Your Leadership To The Brink Of Total Unconditional Surrender

HERE WE DRAW THE LINE

NOW WHAT COULD HAVE UPSET HIM?

THIS AD IS COSTING US SOMETHING OVER $400.00, AND THE MONEY COMES IN SMALL AMOUNTS FROM MANY PEOPLE. USUALLY, THE PEOPLE DON'T HAVE TO BUY ADS TO SAY THEY ARE FOR THEIR CITY, BUT OUR NEWSPAPER IS STILL ON THE FENCE, AND IT MAY NEVER MOVE OFF, SO WE THOUGHT WE HAD TO SPEND THE MONEY.

IF YOU DID NOT READ THE CHAMBER OF COMMERCE AD IN LAST SATURDAY'S ODESSA AMERICAN, WE URGE YOU AS A MATTER OF PUBLIC SERVICE TO READ IT AT ONCE. WE DON'T WANT ANYONE TO MISS IT!

The ad implies that Odessans who support elevation of Odessa

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Appendix

"Me No Sealy Dealy"

believe our Legislature should take the lead for private interest groups who now claim to speak for them.

Chamber officials in their ad imply we are not BIG enough, WISE enough, and UNSELFISH enough to have a four - year school in Odessa.

Apparently Midland people have all of these virtues that Odessans lack, if we are to believe the Chamber propaganda line, since our Chamber officials endorse an upper level institution for that county.

They take this position despite the fact that Midland citizens once let a college die, and twice refused to help Odessa College live.

WE SORT OF THINK THAT THE PLACE THAT HAS WATCHED OVER THE ONLY JUNIOR COLLEGE AROUND, THE PLACE THAT HAS HAD NO HELP WITH THE TAX LOAD, THE PLACE THAT HAS BUILT ITS JUNIOR COLLEGE INTO ONE OF THE FINEST, AND THE PLACE THAT HAS BEEN PROMISED A SENIOR COLLEGE BY EVERY AREA LEGISLATOR FOR THE PAST TEN YEARS, MIGHT OUGHT TO BE A PRETTY SAFE PLACE FOR A COLLEGE. WHAT DO YOU THINK?

During the last Senate race Senator Snelson and then Senator Hardeman fought it out in our county along the lines of which could do the most to elevate Odessa College. Representatives Pickens and Slack likewise have repeatedly promised the elevation of Odessa College. These are decent men, and men who will not go back on their word. Our Chamber of Commerce Educational Committee has sabotaged them, and is now pressuring them to go back on their word. They want your support. All three of them say that they did not want our Chamber of Commerce to get in this position. Please write them and let them know where you stand.

PRESENTED IN THE INTEREST OF LONG SUFFERING, BUT NO LONGER GULLIBLE, TAXPAYERS — BY THE COMMITTEE TO KEEP ODESSA COLLEGE IN ODESSA

Mrs. Murray H. Fly
Robert Sindermann
Chunky Hendrick
Mike Earney
Mrs. D. T. Osborn
Mrs. Otis Geers
Warren Burnett
Ernest Shelton

Mrs. Robert Dooley
Mrs. Palmer Ramsey
Mrs. Hugh Weathersby
C. A. Noll
Mrs. Betty Pyle
Frank Spaulding
Mrs. Henry Pegues
Mrs. C. A. Noll

Mrs. D. W. Owens
P. C. Ramsey
Mrs. Bill Bently
Mrs. Steve Cozby
Bessye Cowden Ward
Mrs. Tom McKnight
Mrs. Harold Young
Josh H. Parr

Palmer Ramsey
Earl Frahcell
Norman Maney
Mrs. Don Clemmer
Bill Bently
Mrs. Paul Collum
Mrs. Warren Burnett
Robert Dooley

(Paid Pol. Ad. by Committee To Keep Odessa College in Odessa)